Supreme Court, U.S.
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No. (1)

In The

Supreme Court of the United States

WILLIE JAMES HOLMES,

Petitioner,

v.

DOLAN WALLER; WILKINSON COUNTY CORRECTIONAL CENTER; MISSISSIPPI DEPARTMENT OF CORRECTIONS; AND MIKE MOORE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was habeas Petitioner's claim that his conviction for murder based upon his alleged conspiracy with and assistance to a co-indictee (the alleged shooter) violated his due process rights because the state handled the two cases with fundamentally inconsistent theories procedurally barred where the prosecutor remanded the charges against the co-indictee six months after petitioner's appeal?

Whether or not the claim was procedurally barred, did Petitioner demonstrate cause and prejudice, a manifest miscarriage of justice, and a conflict with this Court's decision in *Bradshaw v. Stumpf*, 545 U. S. 175, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005), such that the circuit court should have reversed the district court's denial of habeas relief?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	9

APPENDIX

Opinion of the Fifth Circuit	App. 1
Report and Recommendation of United States Magistrate Judge	App. 3
Order adopting Report and Recommendation of United States Magistrate Judge	App. 28
Judgment on Report and Recommendation of United States Magistrate Judge	App. 30
Remand Order of State Court	App. 31
State Court Order Dismissing Application for Post Conviction Relief	App. 32
Mississippi Code Annotated § 99-39-21	App. 33
28 U. S. C. § 2254	App. 35

TABLE OF CONTENTS – Continued

Page

Amendment V, U. S. Constitution ..... App. 39

Amendment VI, U. S. Constitution ..... App. 39

Amendment XIV, U. S. Constitution ..... App. 40

TABLE OF AUTHORITIES

Page

CASES:

Barrientes v. Johnson, 221 F. 3d 741 (5th Cir. 2000)..... 8

Bradshaw v. Stumpf, 545 U. S. 175, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005)..... 7

Fairman v. Anderson, 188 F. 3d 635 (5th Cir. 1999)..... 5

Giglio v. United States, 405 U. S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)..... 8

Holmes v. State of Mississippi, 798 So. 2d 533 (Miss. 2001)..... 1, 3

Holmes v. State of Mississippi, Supreme Court of Mississippi, Case No. 2002-M-01750 (March 7, 2003)..... 3

Napue v. Illinois, 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)..... 8

Perkins v. State, 487 So. 2d 791 (Miss. 1986)..... 4

Smith v. Groose, 205 F. 3d 1045 (8th Cir.), *cert. denied sub nom Gammon v. Smith*, 531 U. S. 95, 121 S. Ct. 441, 148 L. Ed. 2d 446 (2000).... 6, 7, 8

Smith v. Johnson, 216 F. 3d 521 (5th Cir. 2000)..... 8

Stokes v. Anderson, 123 F. 3d 858 (5th Cir. 1997)..... 4, 5

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES:

U. S. Const.:

Amend. V 2, 9

Amend. VI 2, 9

Amend. XIV 2, 9

STATUTES:

28 U. S. C. § 1254(1) 1

28 U. S. C. § 2254 ..... 2, 5

Miss. Code Ann. § 99-39-21 ..... 2, 4

PETITION FOR WRIT OF CERTIORARI

Petitioner Willie James Holmes requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion and the judgment of the court of appeals here appealed was unreported and is reproduced in the appendix to this petition, Pet. App. 1. The Report and Recommendation of the United States Magistrate Judge and the Order and Judgment adopting that report and recommendation as the opinion of the District Court, all unreported, are found in the appendix hereto, as well, Pet. App. 3, 28, 30. The only reported opinion or order entered by any other court is *Holmes v. State of Mississippi*, 798 So. 2d 533 (Miss. 2001) (appeal of conviction). The unreported order of the Supreme Court of Mississippi denying Holmes's state motion for post-conviction relief follows at Pet. App. 32.

JURISDICTION

The opinion of the court of appeals was entered on July 20, 2007. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Appendix as follows: Miss. Code Ann. § 99-39-21 (Pet. App. 33-34), 28 U. S. C. § 2254 (Pet. App. 35), and the Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution (Pet. App. 39-40).

STATEMENT OF THE CASE

Petitioner Holmes was indicted along with Brown and Gowdy in the Circuit Court of the First Judicial District of Hinds County, Mississippi, for conspiracy to commit murder and for the murder (less than capital) of Larry Donnell Simmons (Simmons). Gowdy's case was severed and Holmes was tried with Brown on February 8-10, 2000. Pet. App. 1, 5, 12.

The prosecution argued that Gowdy was the shooter. Gowdy's act, she told the jury, "is the same as if . . . [Holmes] had taken that gun and committed the murder." She also told the jury that Holmes's co-defendant Brown "gave Gowdy the gun that did the killing." Although at one point the prosecutor did allege in her argument that Holmes shot during the incident, she made plain that the state believed Gowdy actually killed Simmons. Certainly the evidence indicated Gowdy, not Holmes, shot Simmons. Holmes, she said "saw Kenny [Brown] give Pat [Gowdy] his gun, and in that instant made a decision

to let Pat shoot his brother." Pet. App. 11. More importantly, the prosecutor told the jury that Gowdy had not "gotten away" with the crime and that he would be tried. Pet. App. 11. Holmes and Brown were convicted. Holmes was sentenced to twenty years on the conspiracy charge and life on the murder charge. *Holmes v. State of Mississippi*, 798 So. 2d 533, 535 (Miss. 2001). Holmes appealed. Pet. App. 4.

Despite the prosecution's assurances to the jury that Gowdy would be tried, on August 29, 2000, six months after Holmes's conviction, and almost five months after he appealed, the trial judge, on the prosecutor's motion, remanded Gowdy's charges to the files on the ground of "insufficient evidence to prosecute this case." Pet. App. 12. The Supreme Court of Mississippi affirmed Holmes's conviction and sentence in *Holmes v. State of Mississippi*, 798 So. 2d 533 (Miss. 2001). Pet. App. 4.

Holmes petitioned the Supreme Court of Mississippi for post-conviction relief, raising, *inter alia*, the issue of the state's inconsistency in telling the jury that it would prosecute Gowdy, then remanding the charges. *Holmes v. State of Mississippi*, Supreme Court of Mississippi, Case No. 2002-M-01750 (March 7, 2003). The court denied that petition. Pet. App. 4.

Holmes filed a petition for writ of habeas corpus and was heard by a magistrate judge for the Southern District of Mississippi on December 6, 2005. Pet. App. 3. Holmes argued that the prosecutor's statements to the jury alleging Gowdy's guilt and assuring

his eventual trial, when coupled with the subsequent remand of Gowdy's charges, amounted to prosecutorial misconduct and violated Holmes's constitutional rights. The ensuing report and recommendation, adopted by the order and opinion of the district court, Pet. App. 28-30, denied Holmes's petition. Pet. App. 4. Holmes appealed, and the Fifth Circuit affirmed on July 20, 2007. Pet. App. 1-2.

REASONS FOR GRANTING THE PETITION

First, Holmes's claim is not time barred as the Fifth Circuit said. Pet. App. 1-2. Mississippi's post-conviction relief statute bars only those claims "capable of determination at trial and/or on direct appeal. . . ." Miss. Code Ann. § 99-39-21(1), Pet. App. 33. *See also*, *Perkins v. State*, 487 So. 2d 791, 792-93 (Miss. 1986) (application of § 99-39-21 procedural bar would be inappropriate where defendant had no earlier meaningful opportunity to present issue to court). In the instant case, as the district court properly noted, the issue of inconsistent prosecutorial theories did not arise until six months after Petitioner's conviction and after Petitioner's appeal had been filed. Pet. App. 18. Accordingly, it could not reasonably have been raised on appeal, despite the state supreme court's statement to the contrary. Pet. App. 32. The state supreme court made no findings of fact supporting its order, nor did it give any rationale for holding the inconsistent theories issue to be time barred. Consequently, *Stokes v. Anderson*, 123 F. 3d

858, 860-61 (5th Cir. 1997), in which the question was whether the state court had consistently applied procedural bars, was misapplied in this case by the circuit court. Habeas relief was clearly appropriate under 28 U. S. C. § 2254. Pet. App. 35.

Fairman v. Anderson, 188 F. 3d 635, 641 (5th Cir. 1999), also cited by the circuit court, supports Petitioner's claim. There, the court reviewed the petitioner's case because he demonstrated that, given "the new, reliable evidence that was not presented at trial, . . . it was more likely than not that no reasonable juror would have convicted him based thereon." 188 F. 3d at 644. The district court said in this case that Petitioner "Holmes's convictions did not rest on his being the shooter, but on his complicity in planning and assisting in the murder." Pet. App. 24-25. That given, certainly, had the prosecutor admitted its lack of evidence against Gowdy, or had Petitioner Holmes had available at trial the order remanding Gowdy's case for "insufficient evidence," Pet. App. 31, no reasonable juror would have convicted him for assisting in a murder the state admitted it had "insufficient evidence" to prove. Under the rationale of *Fairman*, Holmes's petition should be granted.

Second, even if the issue here presented were time barred, Holmes has shown both cause and prejudice excusing any default, as well as the manifest miscarriage of justice that will occur if the merits of his claim are not considered and his petition granted. The timing of the state's remand of the Gowdy case alone should excuse Holmes's failure to

litigate the issue in his state court appeal. The prejudice caused by his inability to get the state's remand order before a jury is obvious: no reasonable jury would have convicted Holmes for assisting Gowdy in a crime the state says it cannot prove Gowdy committed. Pet. App. 31.

Notwithstanding the circuit court's statement to the contrary, Pet. App. 2, Petitioner has demonstrated that a manifest miscarriage of justice will occur if his petition is not granted. Throughout this entire process, not a single person has been able to point to any evidence that Holmes shot Simmons. The only way he could possibly have been guilty of murder or conspiracy to commit murder would have been by conspiring with and assisting Gowdy, which is exactly what the prosecution argued in the trial court, and what the district court said Holmes's conviction was based upon. Pet. App. 24-25.

The use of such inconsistent theories was condemned in *Smith v. Groose*, 205 F. 3d 1045, 1052 (8th Cir.), *cert. denied sub nom Gammon v. Smith*, 531 U. S. 95, 121 S. Ct. 441, 148 L. Ed. 2d 446 (2000). There, petitioner and one Bowman were burglarizing a house when they discovered a second party of burglars, including one Cunningham, already in the home. Smith was subsequently convicted of felony murder on the theory that Bowman, his confederate, had killed the homeowner, Chambers. The prosecution next indicted Cunningham for the Chambers murder on the theory that Chambers was already dead when Smith and Bowman had entered the

house. The Eighth Circuit, in granting Smith's habeas petition, found that an accused's due process rights are violated when "an inconsistency exists at the core of the prosecutor's cases against defendants for the same crime." 205 F. 3d at 1052.

This Court reached a similar conclusion in *Bradshaw v. Stumpf*, 545 U. S. 175, 187, 125 S. Ct. 2398, 2407, 162 L. Ed. 2d 143, 156 (2005), where the petitioner, who had pled guilty to felony murder, argued that he was prejudiced by the prosecution's subsequent argument that his partner in the crime had been the trigger man. While this Court said that Stumpf "never provided an explanation of how the prosecution's postplea use of inconsistent arguments could have affected the knowing, voluntary, and intelligent nature of his plea," *Stumpf*, 545 U. S. at 187, 125 S. Ct. at 2407, 162 L. Ed. 2d at 156, it did find that the state's subsequent use of inconsistent theories was relevant to Stumpf's sentencing. This Court remanded the case on that issue.

Although the district court said that Holmes's situation was "not a case like those cited . . . , where the elimination of an inconsistent story might lead to the conclusion that the defendant was innocent," Pet. App. 24, that is not the case. The constitutional problem is the same in Holmes's case as in *Stumpf* and *Groose*: by moving to remand for insufficient evidence, the prosecution took an action fundamentally at odds with its position (and the evidence) at trial that Holmes had acted in aid of Gowdy, whom the state alleged to have been the shooter. The prosecutor's

subsequent remand of Gowdy's case for insufficient evidence was a clear admission that the state had used fundamentally inconsistent theories and, in fact, had misled the jury. The law is clear that if a prosecutor knows or should know that an argument or evidentiary implication is false and goes forward with it anyway, such amounts to prosecutorial misconduct. *Barrientes v. Johnson*, 221 F. 3d 741, 754 (5th Cir. 2000). The government has a duty to serve and facilitate the truth-finding function of the courts. *Groose*, 205 F. 3d 1049 (8th Cir. 2000). That duty not only requires a prosecutor to refrain from presenting false evidence, but to correct false testimony presented. *Giglio v. United States*, 405 U. S. 150, 153-54, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972); *Napue v. Illinois*, 360 U. S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217, 1221 (1959).

The elimination of the "Gowdy-as-shooter" theory would have made a fundamental difference in Holmes's case. If the jury had not been told Gowdy was the shooter and would get his day in court, Holmes would not have been found guilty of "planning and assisting in the murder." Pet. App. 24-25. The remand order should amount to proof of Holmes's innocence of the crimes for which he was convicted even under the most rigorous application of the "manifest miscarriage of justice" standard. *See, e.g.*, *Smith v. Johnson*, 216 F. 3d 521, 524 (5th Cir. 2000) (holding the fundamental miscarriage of justice exception is confined to cases of innocence of the crime of conviction).

Holmes's issues noted above were not procedurally barred. His rights to due process at trial under the Fifth, Sixth, and Fourteenth Amendments was clearly violated. He was prejudiced and a manifest miscarriage of justice resulted.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60280
Summary Calendar

WILLIE JAMES HOLMES,

Petitioner-Appellant,

versus

DOLAN WALLER; WILKINSON COUNTY CORRECTION CENTER; MISSISSIPPI DEPARTMENT OF CORRECTIONS; MIKE MOORE,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:03-CV-533

(Filed Jul. 20, 2007)

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Willie James Holmes was convicted of conspiracy to commit murder and murder less than capital and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sentenced to serve life in prison. Holmes filed the instant 28 U.S.C. § 2254 petition to challenge his convictions and sentences, and the district court denied the petition. When reviewing the denial of a habeas petition, this court analyzes the district court's findings of fact for clear error and its legal conclusions de novo. *Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir. 2001).

Holmes argues that his rights were violated at trial because the State proceeded on the theory that his coconspirator was the shooter, but the charges against this individual were later remanded. The respondents argue that Holmes's claims are procedurally barred. The respondents are correct. *See Fairman v. Anderson*, 188 F.3d 635, 641 (5th Cir. 1999); *see also Stokes v. Anderson*, 123 F.3d 858, 860-61 (5th Cir. 1997). Holmes has not shown cause and prejudice to excuse this default, nor has he shown that a manifest miscarriage of justice would occur if the merits of these claims were not considered. *See Smith v. Johnson*, 216 F.3d 521, 524 (5th Cir. 2000). The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

WILLIE JAMES HOLMES	**PETITIONER**
VS.	**CIVIL ACTION NO. 3:03CV533LN**
DOLAN WALLER and WILKINSON COUNTY CORRECTIONAL CENTER	**RESPONDENTS**

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter was referred to the undersigned for the purpose of conducting an evidentiary hearing and submitting to the District Judge a report and recommendation, by an Order entered by District Judge Tom Lee on October 28, 2005. The hearing was held before the undersigned United States Magistrate on December 6, 2005, pursuant to 28 U.S.C. 2254(e), to further develop the factual basis for the arguments raised by the Petitioner. Having heard the testimony and reviewed the evidence presented by the parties, the court is of the opinion, for the reasons that follow, that Willie James Holmes's Petition for Writ of Habeas Corpus should be denied.

Holmes was convicted of murder and conspiracy to commit murder in connection with the shooting death of Larry Simmons. He was tried with co-defendant

Kenny Brown, who was also found guilty. A third defendant, Patrick Gowdy, who was identified by several witnesses as the actual shooter, was not tried with Holmes and Brown, nor did he appear to give testimony at trial. Ultimately, the case against Gowdy was remanded to the files.

Holmes appealed his conviction to the Mississippi Supreme Court, which affirmed the trial court by an opinion entered on October 25, 2001. The only issues raised on direct appeal, and in Holmes's habeas petition, were that the evidence was not sufficient to support the verdicts against him. Holmes petitioned the Mississippi Supreme Court for post-conviction relief, raising, for the first time, the issue of the failure to prosecute Gowdy, as well as the State's failure to process the gunshot residue test performed on Holmes shortly after the shooting, and ineffectiveness of counsel. That court denied relief, holding that the claim of ineffectiveness did not rise to the level recognized in *Strickland v. Washington*, 466 U.S. 668 (1984), and that the remaining matters could have been raised on direct review and were, therefore, procedurally barred. In his Petition for Writ of Habeas Corpus, Holmes raises the following issues:

1. Petitioner's conviction of murder was not supported by sufficient evidence.

2. Petitioner's conviction of conspiracy to commit murder was not supported by sufficient evidence.

3. Petitioner's conviction of murder was secured through prosecutorial misconduct in the form of improper, untrue, and prejudicial remarks.

4. Petitioner's conviction of murder was secured through presentation of false evidence to the jury.

5. Petitioner was denied the effective assistance of counsel at trial and on appeal in violation of his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

6. Petitioner was denied his right to a trial conducted in conformity with Due Process of Law required by the Fourteenth Amendment because the accumulation of errors rendered his trial fundamentally unfair.

Holmes's convictions stem from the murder of Larry Donnell Simmons, who was shot to death on August 21, 1996, in Jackson. Holmes was indicted for that murder, along with Kenny Markcol Brown and Patrick O'Neal Gowdy. Gowdy's case was severed from Brown's and Holmes's, who were tried together in the Circuit Court of Hinds County on February 8-10, 2000.

Several witnesses testified at the Holmes/Brown trial, and they all stated that Larry Simmons was shot to death near the home of Patrick Gowdy. Christopher Simmons, Larry's brother, arrived home from work on the day of the shooting, to hear from a neighbor that Larry had been shot. As he ran to the street where his brother lay dying, he passed Holmes running away from the scene, carrying a gun. (Tr.

194) Although his brother was not dead when Christopher arrived, he could not tell Christopher who had shot him. A girl who was in the area told Christopher, "They shot your brother." (Tr. 206)

Officer Kevin Levine with the Jackson Police Department responded to the 911 call made about the shooting. (Tr. 213) He identified Felichia Gordon and Delesia Gordon as witnesses. (Tr. 215) Both Delesia and Felichia testified at trial. According to Delesia's trial testimony, she heard Simmons arguing with someone just before the shooting, but she could not identify the other person's voice. However, after she heard the shots, she saw Holmes and Brown run past her, both with guns, and one of them said, "Did you get that nigger?" (Tr. 223-25) After that, she saw Gowdy driving away. (Tr. 226) (This testimony was inconsistent with a statement that she gave shortly after the incident, in which she said that the voices arguing belonged to Simmons and Gowdy. (Tr. 232))

Felichia Gordon also testified at trial. She likewise testified that she could only identify one voice in the argument just before the shooting. (Tr. 248) She also stated that Holmes and Brown ran past her after the shooting. (Tr. 249) However, her previous statement indicated that she had looked out her back door during the argument and saw Gowdy arguing with Simmons. (Tr. 258) After the testimony of these two witnesses, there was a conference out of the presence of the jury in which the attorneys discussed the availability of Patrick Gowdy to testify. (Tr. 271) Counsel for Kenny Brown informed the court that he

had not subpoenaed Gowdy, because of the prosecutor's representation that he would testify on behalf of the State. The prosecutor responded that Gowdy had been subpoenaed, but she was not under an obligation to tell the defense when he would testify. (Tr. 272) After defense counsel's request for a *subpoena instanter,* the trial judge asked the prosecutor whether Gowdy would appear in court at some point to be served. (Tr. 274) She replied:

> I can't answer that, Your Honor. That would be part of the State's trial strategy in this case. We have subpoenaed him, and, as I said, if, after we finish with the witnesses we call this morning we decide to – I may or may not. It just depends on how the testimony is going. Right now we are prosecuting the codefendants in this case.

Counsel for Brown then informed the court that he would submit a *subpoena instanter* after the next recess. There is no indication in the record that such a subpoena was submitted.

Following this conference, Detective Eric Amundson testified for the prosecution. He investigated Simmons's death, and, in the course of that investigation, spoke with Holmes. (Tr. 279) Through Amundson, the State offered a statement made by Holmes on the night of the shooting. (Tr. 281) In that statement, Holmes admitted to being present at the time Simmons was killed. According to Holmes, Simmons had stolen some things from Gowdy's home, and Gowdy was aware of the theft by Simmons. Holmes said that

Gowdy asked him and Brown, who was also there, whether they had a gun for sale. As they were talking, Brown spotted Simmons in the alley next to the house, and Brown and Gowdy went inside Gowdy's house. Holmes went to the alley and started talking to Simmons, at which point Gowdy came out of the house shooting. Holmes said he ran away. (Tr. 284) Amundson also had a statement made by Holmes two days later, August 23, at about 3:00 p.m. (Tr. 290) In that statement, Holmes added that Brown gave Gowdy the gun that he fired at Simmons. Holmes also admitted that he had a gun with him at the time of the incident. (Tr. 293) He said he pulled the gun out of his pocket after hearing the gunshots, and he ran away holding it.

Amundson also took a statement from Brown on August 26. (Tr. 299) Brown admitted to being present at Gowdy's house on the day that Simmons was shot. In his version of the events of that day, he went into the house after the initial conversation with Gowdy and Holmes to look at the hole in the wall through which Simmons had allegedly entered Gowdy's home. While he was inside, he heard Holmes yell, "There goes Bam [Simmons's street name]." (Tr. 300) Apparently, Brown's interrogation ended at that point, but picked up approximately an hour later. Again, Brown stated that he was in Gowdy's house when Simmons arrived, and, by the time he got to the door of the house, Gowdy was already shooting. (Tr. 304) He said that he knew Gowdy was going to shoot Simmons, but thought he only intended to shoot him in the leg. (Tr.

305) Amundson also took two statements from Gowdy that were not introduced into evidence. (Tr. 314) Amundson testified that two guns were recovered in the course of the investigation, but neither was found to have been used in the shooting. (Tr. 320) He also admitted that a gun residue test was performed on Holmes, but that the results had not yet been returned by the State. (Holmes has now produced evidence that the test was never processed.)

Detective Reggie McCann also investigated the Simmons murder. Through him, the State introduced a third statement from Holmes, made later on August 23. (Tr. 331) In it, Holmes repeated his admission to having been at Gowdy's home the afternoon of the shooting, and relates that Gowdy tried to buy both his gun and Brown's gun. (Tr. 333) He also said that Gowdy told him that he planned to shoot Simmons in the leg to teach him a lesson. McCann was the last witness to testify for the State before it rested. (Tr. 344) At that time, there was no objection made on the record by defense counsel to the fact that Gowdy had not testified.

Both Brown and Holmes moved to dismiss the indictment against them at that point, arguing that there had been no evidence presented that they had either killed Simmons or conspired with Gowdy to do so. (Tr. 346-47) In arguing against the motion, the prosecutor stated that there was sufficient evidence that Brown and Holmes assisted in the murder, even though Gowdy did the shooting. (Tr. 347) The motion was denied.

The Defendants presented three neighbors to testify as to what they saw on the day Simmons was killed. Zinder Jefferson heard the shots, then saw Gowdy run past him. He told Gowdy, "You done shot that man." (Tr. 363) Jefferson did not see either Brown or Holmes at the scene. (Tr. 365) Barbara Perdue was on her front porch when she heard the shots and saw Simmons running away from Gowdy. (Tr. 383) She did not see Brown at the scene, but she did see Holmes after Simmons was shot. (Tr. 384) Her sister, Octavio Perdue, was also on the porch when she saw Brown, Holmes and Gowdy across the street. (Tr. 410) She heard someone call out Simmons's name, then Gowdy went in his house, and Brown and Holmes went around the other side. She then saw Gowdy firing his gun. Holmes came to them later and said they needed to go see about Simmons. Octavia Perdue said that Gowdy was the only one of the three she ever saw with a gun. (Tr. 411)

Brown and Holmes both testified at trial. Brown's trial testimony re-stated his earlier statement, in that he said that he was inside Gowdy's house, looking at the hole in the wall, when Simmons was spotted. (Tr. 440) After hearing the yell, he went to the window to see Simmons. (Tr. 443) He heard the back door slam, and he saw Gowdy firing at Simmons, who was running away. Holmes testified that Gowdy and Brown went into the house before Simmons arrived, while he stood in the door. (Tr. 466) He heard someone yell, "Bam!" Holmes walked over to Simmons, but, before he got close, Gowdy came off his

back porch shooting at Simmons, and Holmes ran away. Holmes testified that investigators took his gun. (Tr. 493) After Holmes's testimony, the defense rested. There is no indication that defense counsel ever attempted to obtain the testimony of Patrick Gowdy. In rebuttal, the State presented Max Mayes, a former Jackson Police Officer, who testified that Gowdy's girlfriend had made a house burglary report on the afternoon of Simmons's death. (Tr. 498)

The Defendants once again moved to dismiss the case against them. (Tr. 507) In response to the motion, the prosecutor stated, "And the act of Patrick Gowdy is the same as if they themselves had taken that gun and committed the murder." (Tr. 509) Later, she stated that the State's contention was that Brown "gave Gowdy the gun that did the killing." (Tr. 524) The trial judge denied the motion to dismiss, holding, "[I]t's not necessary that in order to be found guilty of murder that he is the shooter." (Tr. 533)

In closing argument, the prosecutor told the jury, "[Y]ou heard about a Patrick Gowdy who is also charged in this case, and he will get his day in court just as these two defendants have gotten their day in court. So by no means has Patrick Gowdy gotten away or not charged." (Tr. 568) Later, she stated, "Two people were shooting, Patrick Gowdy from one end and defendant Holmes from the other." (Tr. 571) Finally, in her rebuttal, she explained the charge of conspiracy against Holmes, stating that he "saw Kenny [Brown] give Pat [Gowdy] his gun, and in that instant made a decision to let Pat shoot his brother."

(Tr. 593) The jury found both Holmes and Brown guilty of murder and conspiracy to commit murder.

As stated earlier, Gowdy's case was remanded by an Order signed by the trial judge about six months after Holmes was tried. The court has been supplied with two different copies of the order by which the case was remanded. Both copies reflect that the trial judge signed the Order on August 29, 2000. One copy, which contains the seal of the Circuit Clerk, reflects that the Order was filed on August 31, 2000. The other copy was stamped "Filed" on October 4, 2002, and initialed by docket clerk. There was never any satisfactory explanation as to the discrepancy in these dates.

In reviewing this Petition, the court must consider the applicable portions of the antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-32, 110 Stat. 12144, and the standard of review imposed upon this court thereby. Title I of the AEDPA modified 28 U.S.C. § 2254, which now provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,

28 U.S.C. § 2254(d).

Under the AEDPA, where the state court adjudicates the petitioner's claim on the merits, this court reviews questions of fact under § 2254(d)(2), while questions of law or mixed questions of law and fact are reviewed under § 2254(d)(1). Factual findings are presumed to be correct, and the court defers to the state court's decision regarding factual determinations unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Hill v. Johnson,* 210 F.3d 481, 485 (5th Cir. 2000); 28 U.S.C. § 2254(d)(2). The court independently reviews questions of law and mixed questions of law and fact to determine whether the state court's decision thereon was either "contrary to" or an "unreasonable application of" federal law. *Williams v. Taylor,* 529 U.S. 362 (2000); *Williams v. Puckett,* 283 F.3d 272 (5th Cir.2002); *Hill v. Johnson,* 210 F.3d at 485.

The first step in this inquiry is to determine what federal law should be applied to the state court's decision. *Williams,* 529 U.S. at 378. The determinations of the state courts must be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*; § 2254(d)(1). Next, this court must determine whether the state

court's decision was "contrary to" or "an unreasonable application of" that established Federal law.

As Justice O'Connor explained in *Williams,*

1. A state-court decision will be contrary to clearly established precedent:

    a. if the state court applies a rule that contradicts the governing law set forth in previous Supreme Court cases; or

    b. if the state court confronts a set of facts that are materially indistinguishable from a previous Supreme Court decision and nevertheless arrives at a result different from the Supreme Court precedent. 529 U.S. at 362,

2. A state court's application of the correct legal precedent to the particular facts of a petitioner's case will be an unreasonable application of the law:

    a. if the state court identifies the correct governing legal rule from Supreme Court cases but unreasonably applies it to the facts of the particular state prisoner's case; or

    b. if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

529 U.S. at 406; *see also Ramdass v. Angelone*, 530 U.S. 156 (2000); *Chambers v. Johnson*, 218 F.3d 360 (5th Cir. 2000); *Perry v. Johnson*, 215 F.3d 504, 507-09 (5th Cir. 2000). The Supreme Court in *Williams* disapproved earlier decisions basing the standard of "unreasonableness" on a subjective standard and held, instead, that the standard was an objective one. *Id.* at 409. The term "unreasonable," however, was distinguished in *Williams* from "erroneous" or "incorrect;" thus, a state court's incorrect application of the law may be permitted to stand if it is, nonetheless, "reasonable."

Holmes claimed in state court that the evidence against him did not support his convictions. The United States Supreme Court articulated the standard of review to be applied in federal habeas corpus claims that allege that a state court conviction was based on insufficient evidence in the case of *Jackson v. Virginia*, 443 U.S. 307 (1979). The relevant question is, "[W]hether, after viewing the evidence and the reasonable inferences which flow therefrom in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 324; *see also United States v. Smith*, 203 F.3d 884, 887 (5th Cir. 2000), citing *Jackson v. Virginia*, 443 U.S. 307 (1979); *West v. Johnson*, 92 F.3d 1385, 1393 (5th Cir. 1996). As the United States Supreme Court has explained, "Federal Courts are not forums in which to relitigate state trials." *Autry v. Estelle*, 464 U.S. 1, 3 (1983). The primary avenue for challenging the validity

of a conviction is the direct appeal, and, when that process is completed, a presumption of finality and legality attaches to the conviction. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1982).

In reviewing this claim with reference to the conspiracy to commit murder charge, the Mississippi Supreme Court noted, "The act of any conspirator is the act of all of the conspirators." *Holmes v. State*, 798 So. 2d 533, 538 (Miss. 2001), citing *Norman v. State*, 381 So. 2d 1024, 1029 (Miss. 1980). Then the court considered the evidence as summarized by the state:

> (1) Holmes went to Gowdy's house armed with a 9mm handgun; (2) Kenneth Brown was there and also armed with a 9mm handgun; (3) Gowdy's house had allegedly been burglarized by Simmons and Gowdy was looking gun; (4) Holmes saw Simmons and announced that fact to Gowdy and Brown; (5) Gowdy and Brown then went inside the house while Holmes stood outside and talked to Simmons, knowing Gowdy and Brown were going to come out and shoot Simmons; (6) after the shooting, at least two witnesses saw Holmes and Brown with their weapons drawn, asking each other, "Did you get him? Did you get that nigger?

798 So. 2d at 538. Although statements and testimony from Holmes and Brown disputed some of that evidence, the court found that "reasonable jurors could find Holmes guilty of conspiracy to commit murder." *Id.*

With regard to the murder charge, the court added the following facts that a reasonable juror could have found:

> (7) Holmes and Brown were seen by the Gordon sisters holding their guns in the air; (8) Holmes ran down an alley with the intent to head off Simmons as he was trying to get away; (9) Holmes was seen, by Christopher Simmons, running down Ridgeway Street with a gun in his hand; and (1) Holmes left Simmons in the alley, dying, then hid his gun.

Id. at 539. The court then agreed with the State's contention "that Holmes's and Brown's admissions and confessions to law enforcement, Holmes's and Brown's contradictory testimony at trial, and the testimony from other witnesses, were sufficient to support Holmes's convictions of conspiracy to commit murder and murder less than capital." *Id.*

The question of whether the evidence was sufficient to convict Holmes of either murder or conspiracy to commit murder are properly before the court, haying been raised on direct appeal. Based on the record before the state court, there was ample evidence to support the verdict of murder or conspiracy to commit murder, even in light of the contradictions in the stories of the various witnesses. The court finds that the Mississippi Supreme Court properly applied the law announced in *Jackson v. Virginia,* and its analysis of the facts with regard to that law was reasonable. Habeas relief is not available to Holmes

to question the state court's rulings on his convictions.

However, Holmes did not argue the failure to prosecute Gowdy as part of his evidentiary challenges on direct appeal, as that fact was not part of the state court record. Normally, applicants seeking federal habeas relief under § 2254 are required to exhaust all claims in state court prior to requesting federal collateral relief. *See Edwards v. Carpenter*, 529 U.S. 446 (2000); *Coleman v. Thompson*, 501 U.S. 722, 729-55 (1991); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998). The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court in a procedurally proper manner. *Id.*; *see also Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999); *Whitehead.*

Despite the fact that the issues surrounding Gowdy's avoidance of prosecution were not presented on direct appeal, this court held an evidentiary hearing on grounds that the entry of the Order remanding Gowdy's case post-dated that appeal. At the hearing, the State offered another copy of the Order, certified by the Circuit Clerk, with an earlier date. Neither copy appears to have been altered, and the court is disturbed by the discrepancy, which was never adequately explained. Because of that, and because the court has heard evidence regarding the circumstances under which Gowdy's case was remanded, the court is inclined to address this issue on its merits. Holmes now argues that the evidence that convicted him was tainted by the prosecution's proffer of evidence that it

did not believe – that Gowdy was actually the one who shot Simmons. The presentation of improper or false evidence or statements by a prosecutor to a jury in a state criminal prosecution may implicate the due process and fair trial guarantees of the Fifth, Sixth, and Fourteenth Amendments if the evidence or statements render the trial fundamentally unfair. *Barrientes v. Johnson,* 221 F.3d 741, 753 (5th Cir. 2000). To prevail on such a claim, "the petitioner must show that (1) the testimony was false, (2) the testimony was material to the verdict, and (3) the prosecutor knew or believed the testimony to be false." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996). In this case, the two prosecutors, Faye Peterson and Glenda Haynes, testified that they believed that all three of the men were involved in the shooting, in some capacity. As stated earlier, Gowdy was not tried with Holmes and Brown because his attorney asked for a severance, which the trial court was obligated to grant.

In assessing the case, Peterson testified that she had statements from two witnesses who were unavailable to testify at trial, Ruby Sherry and Willie White, who both implicated Holmes more than Gowdy. Peterson admitted that, at the time of Holmes's trial, she did not believe that Simmons was the shooter. However, she was willing to put on the witnesses and let the evidence develop before the jury, particularly since they were unable to interview some of the witnesses prior to trial. Additionally, Peterson responded at length to an Interrogatory

propounded by Holmes's counsel as to the determination to remand Gowdy's case. Her statement concluded:

> Before resting in rebuttal, the decision was made strategically not to call Patrick Gowdy because based on the State's case and even the defense case, there was sufficient evidence to convict these defendants. The State realized that we were not there to defend Patrick Gowdy so when the defendants testified, we used their own case against them during cross-examination of the defendants and their witnesses. What we did was to use their own evidence to put them at the crime and to show that they were involved in the murder of Larry Simmons. It was not our intention during the trial to exonerate Patrick Gowdy or to try to dispute the defendant's testimony about his actions even though the State did not believe their version of events.
>
> Finally, the undersigned reviewed the testimony and notes from the defendants during trial. In this case you have Willie Holmes, a 16-year old drop out who admits to having a 9mm in his possession on a day when he was not in school. This firearm he obtained from his uncle Steve Jackson, an individual previously convicted of drugs. [Evidence attached.] This same person was initially implicated by an informant on the night of the shooting by Detective Wallace Jones's informant. This should be considered in light of the statement by Ruby Sherry that Zinder Jefferson had threatened to shoot

Kenny Brown and all of us if they didn't stop selling drugs and shooting around there. [From statement given by Ruby Sherry.] Holmes in his testimony admits to having on him a 9mm firearm, and the evidence from the crime scene indicates there were several 9mm shells found in the area of the shooting. [Crime scene evidence report attached.]

Then, you have Kenny Brown, who admitted that he was an 18 year old drop out who allegedly could barely read and write, who stated that, at 8:30 that morning he took Gowdy to buy an illegal firearm. Brown stated that he did not come forward about the crime because he had marijuana on him at the time of the shooting. A copy of Mr. Brown's extensive criminal arrest history for the mere two years he could be charged as an adult before this shooting is attached hereto for reference. [Attached] According to his arrest record, Mr. Brown was known to use numerous aliases, such as Michael Harris, Mike Kenneth Bryant, Mark Fisher, Michael Harris, Kenneth Bryant, and Markco Fisher.

The two defendants in their statements could not get their statements together as to whether Gowdy got the gun from an illegal firearm purchase or he took it from Brown. If Gowdy took it from Brown, then Brown would have to deal with the issue of being a convicted felon in possession of, not only a firearm, but marijuana as well. [Defendants' statements attached.] There were no witnesses at the time of the shooting, other than

Willie Lee White, a.k.a. Kool Aid, another drug dealer and friend of Brown and Holmes that implicated Gowdy. He was not called by the defense because his story would have implicated Brown in the shooting and was contradictory to how Holmes claims Gowdy received a gun from the victim. [Statement attached.] The State did not interview Willie White, although efforts were made to locate him. All other witnesses – the Perdue sisters and Zinder Jefferson – came forward through defense counsel and did not have sufficient indices of reliability. After the trial of this case, Investigator Mayes and I reviewed the trial notes and the evidence to determine if there was even enough to charge Gowdy with being involved in a conspiracy to kill Larry Simmons. But considering that the victim's brother had mentioned the prior attempt to shoot at Simmons by Holmes, and that Willie White knew of a motive for the shooting by Holmes, and Gowdy mentioned that Brown wanted to shoot Simmons because he owed him some money, the State did not have reliable independent witnesses that were not tampered with by the defense or a theory to convict Patrick, the decision was made to remand the case.

The only credible witnesses presented in this case did not present plausible evidence to convict Patrick Gowdy. The statements heard by the minor Gordon girls, the statement from Ruby Sherry and the actions of the Petitioner seen after the shooting were credible to the State. Reviewing the statements

> and accounts of the defendants (which would be considered self-serving and created to place the blame on a third individual as Barbara and Octavia Perdue indicated that was "not from the neighborhood") would indicate that, under the circumstances, that they had a motive to shift the blame to Patrick Gowdy.

This statement was corroborated at the evidentiary hearing by testimony given both by Ms. Peterson and by Ms. Haynes.

Of great concern to this court was Holmes's contention that Gowdy was not prosecuted because he had a relative on Jackson's police force. However, no evidence of that contention was presented at the evidentiary hearing, and the court will not consider that allegation with no evidence to support it. The United States Supreme Court has made it clear that, absent an improper motive, a prosecutor has the discretion to forego prosecution of a case. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). The court has reviewed the statements made by the prosecutors in Holmes's case, both in their discovery responses and in their testimony at the hearing, and finds their explanation for remanding Gowdy's case to be credible and reasonable.

Moreover, while the prosecutors in Holmes's case may have taken advantage of the story told by him and Brown to argue that Gowdy was the triggerman, the court finds that their lack of belief in that story did not make their reliance on it improper. This is not a case like those cited by the Petitioner, where the elimination of an inconsistent story might lead to the conclusion that the defendant was innocent. Here, the prosecutor could have argued that either Holmes, Brown, or Gowdy actually shot Simmons. The fact that they argued that Gowdy shot him, rather than Holmes or Brown, does not help Holmes here, since arguing that either he or Brown shot Simmons would not have made Holmes less guilty. For all of these reasons, the court finds that there was no improper argument or prosecutorial misconduct in this matter that would warrant granting habeas relief.

With regard to the other errors argued by Holmes, the State's failure to process the gun residue test performed on Holmes was a matter that could have been known to him at trial and not raised on direct appeal. He is, therefore, barred from raising it for the first time on a habeas petition. Even if he could argue it, the results of a negative test would not, necessarily, have changed the jury's verdict on either charge. Although he argues that Detective Amundson presented false testimony to the jury, there is no evidence that Amundson was aware that the gunshot residue test had not been performed. Moreover, Holmes's convictions did not rest on his being the shooter, but on his complicity in planning

and assisting in the murder. Therefore, while the results of the residue test might have slightly strengthened or weakened the state's case, the absence of those results was not a material factor in the jury's verdict.

In the best of all possible worlds (for Holmes), the State would have been unable to argue that Gowdy was involved in the murder, and the residue test would have come back negative as to Holmes. In that event, there was ample evidence to implicate Brown as the shooter, with Holmes's assistance, which the prosecutors testified at the evidentiary hearing was their actual belief. All of the witnesses place the three of them at the scene, and the Gordon sisters both testified that they saw Holmes and Brown running away afterward. Delisia Gordon testified that they had guns, and one of them asked the other, "Did you get that nigger?" Having reviewed the trial record, the evidence, and the testimony at the evidentiary hearing, the undersigned believes that the failure to process the gunshot residue test or to present the results at trial caused no constitutional error upon which Holmes may seek habeas relief.

Holmes argues that his trial counsel was ineffective for failing to discover that the gunshot residue test had been returned unprocessed, for failing to call Amundson's false testimony to the attention of the court, for failing to object to the prosecutor's improper argument regarding Gowdy, and for failing to vigorously represent Holmes. The standard for determining the effectiveness of counsel during trial is the

two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hill v. Lockhart,* 474 U.S. 52 (1985). A defendant must show that counsel's presentation fell below an objective standard of reasonableness, and that there is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). To meet the prejudice prong, the defendant must affirmatively prove, and not merely allege, prejudice. *Bonvillain v. Blackburn,* 780 F.2d 1248, 1253 (5th Cir.), *cert. denied*, 476 U.S. 1143 (1986).

Under *Strickland,* Holmes "must prove that his counsel made errors so serious that they deprived him of his Sixth Amendment rights and that the deficient performance prejudiced his defense." *Smith v. Puckett,* 907 F.2d 581, 584 (5th Cir. 1990), *cert. denied*, 498 U.S. 1033 (1991). Generalized claims cannot satisfy this burden of proof; a habeas petitioner must show "specific incidents of actual prejudice resulting from counsel's performance" in order to meet the *Strickland* standard. *Id.* Thus, a "wholly general and conclusory assertion" will not establish a claim of ineffective assistance of counsel. *Id.*

With regard to Holmes's specific claims, the court has found that neither Amundson's testimony regarding the residue test or the subsequent remand of Gowdy's case deprived Holmes of a fair trial. Therefore, his counsel's failure to address those issues at trial or on appeal likewise posed no Sixth Amendment

problem. Holmes also claims that his counsel failed to vigorously represent him and lays the blame for that failure on his attorney's disciplinary problems that ultimately led to a one-year suspension from the practice of law. This is the type of "general and conclusory" assertion that is disfavored under *Strickland* and cannot form the basis for habeas relief.

For all of these reasons, the undersigned finds that Willie Holmes's petition for writ of habeas corpus contains no argument that entitles him to relief and concludes that the petition should be dismissed with prejudice. The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendations contained within this report and recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. 28 U.S.C. § 636; *Douglass v. United Services Auto. Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir. 1996).

This the 13th day of February, 2006.

S/ Alfred G. Nicols
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WILLIE JAMES HOLMES — PLAINTIFF

VS — CIVIL ACTION NO. :03CV533LN

DOLAN WALLER and
WILKINSON COUNTY
CORRECTIONAL CENTER — RESPONDENTS

ORDER

This cause came on this date to be heard Petitioner's Objections to the Report and Recommendation of the United State Magistrate Judge, and the Court, having fully reviewed the Report and Recommendation of the United States Magistrate Judge entered in this cause, on or about February 14, 2006, and being duly advised in the premises, finds that said Report and Recommendation should be adopted as the opinion of this Court.

IT IS, THEREFORE, ORDERED that the Report and Recommendation of United States Magistrate Judge Alfred G. Nicols, Jr. entered on or about February 14, 2006, be, and the same is hereby, adopted as the finding of this Court, and the cause should be dismissed with prejudice. A separate judgment will be entered herein in accordance with this Order as required by Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED, this the 7th day of March, 2006.

/S/ TOM S. LEE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WILLIE JAMES HOLMES — **PETITIONER**

VS. — **CIVIL ACTION NO. 3:03CV533LN**

DOLAN WALLER and WILKINSON COUNTY CORRECTIONAL CENTER — **RESPONDENTS**

JUDGMENT

This matter having come on to be heard on this date upon the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 14, 2006, and the Court, after a full review of the record, having adopted said Report and Recommendation as the finding of this Court by Order dated this day, finds that this matter should be dismissed with prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the above captioned cause be, and the same is hereby, dismissed with prejudice.

SO ORDERED this the 7th day of March, 2006.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs.

PATRICK ONEAL GOWDY
A/K/A:

CAUSE NUMBER
97-1-027-01 WSY

SSNO: 425-27-1541
S/M DOB: 9/31/75

ORDER TO REMAND TO FILES

This day into open court came the District Attorney who prosecutes for the State of Mississippi and moves the Court to enter a Remand in the above styled and numbered cause, and the Court, being fully advised in the premises, is of the opinion that said Motion should be sustained, based upon the following, to-wit:

INSUFFICIENT EVIDENCE TO PROSECUTE THIS CASE

IT IS, THEREFORE ORDERED AND ADJUDGED, that a Remand be and the same is hereby entered in this cause.

ORDERED AND ADJUDGED, this the 29TH day of AUGUST, 2000.

/s/ W. Swan Yerger
W. SWAN YERGER, CIRCUIT JUDGE

/s/ [Illegible]
FAYE PETERSON Asst. District Attorney

Serial: 103009

IN THE SUPREME COURT OF MISSISSIPPI

No. 2002-M-01750

WILLIE JAMES HOLMES ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

(Filed Mar. 07, 2003)

This matter came before a panel of Smith, P.J., Waller and Easley, JJ., on the application for leave to seek post-conviction relief filed by Holmes. The panel finds that the claim of ineffective assistance of counsel does not meet the standard imposed by *Strickland v. Washington,* 466 U.S. 668 (1984). The remaining issues were capable of determination on direct appeal and are now procedurally barred from consideration pursuant to Miss. Code Ann. § 99-39-21.

IT IS THEREFORE ORDERED that the application for leave to seek post-conviction is hereby denied.

SO ORDERED, this the 6th day of March, 2003.

/s/ William L. Waller, Jr.
WILLIAM L. WALLER, JR., JUSTICE

Mississippi Code Annotated § 99-39-21. Procedural waiver of objections, defenses, claims; collateral estoppel; res judicata; burden of proof.

(1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

(2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

28 U.S.C.A. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the

court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

UNITED STATES CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.